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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DAVID P. WILSON, Plaintiff v. JOHN Q. HAMM, Commissioner, Alabama Department of Corrections, Defendant.	))))))))))	Case No. 2:24-cv-00111-ECM *DEATH PENALTY CASE*

EXPEDITED MOTION TO COMPEL PRESERVATION OF PULSE OXIMETERS

Plaintiff David P. Wilson, by and through undersigned counsel, respectfully requests that this Court compel Defendant John Q. Hamm to preserve the two pulse oximeters used by the Alabama Department of Corrections ("ADOC") in conducting all previous nitrogen hypoxia executions until such time as the data recorded during the previous nitrogen hypoxia executions that is stored on those medical devices have been extracted. Specifically, Mr. Wilson requests that Defendant and ADOC be instructed by the Court to preserve the pulse oximeters by refraining from using the devices, ensuring that the batteries remain inside the devices, and properly marking and storing the devices to prevent accidental deletion, until the data stored

on them can be extracted either by the Defendant, the Plaintiff, or a third party. Undersigned counsel has conferred with opposing counsel as required under Fed. R. Civ. P. 37(a)(1), but the parties were unable to resolve the issues raised in this motion.

This matter is time-sensitive, as the existing data on the pulse oximeters may be overwritten or deleted if the devices are used, and the data on the devices will be deleted if the batteries in the devices run out of power. Given the expedited nature of this motion, Defendant has agreed to file a response by March 5, 2026, and Plaintiff has agreed to forego a reply.

In support of this motion, Plaintiff states as follows:

FACTS

1. Plaintiff David Wilson is raising a § 1983 challenge to the State of Alabama's nitrogen hypoxia execution protocol. His amended complaint raises facial and as-applied challenges under the United States Constitution and international law.

2. Mr. Wilson alleges that condemned prisoners executed under the nitrogen hypoxia protocol may be subject to a lengthy period of consciousness from the time that nitrogen gas begins flowing, that this period of consciousness may be agonizing, and that it inflicts superadded pain in violation of the Eighth Amendment

and international law. *See* Doc. 35. Defendant disputes these allegations. *See* Doc. 74, ¶ 71.

3. Resolving the factual disputes concerning the length of consciousness during nitrogen hypoxia executions is critical to this litigation. The rate of decline in oxygen and heart rate are indicative of consciousness as well as the stress and associated pain suffered by the condemned person.

4. According to the execution protocol, ADOC uses two pulse oximeters and two electrocardiograph ("EKG") machines during each nitrogen hypoxia execution to monitor the condemned person's heart rate, heart rhythm, and oxygen levels. The data from such devices are the only available data documenting these vital statistics in previous nitrogen hypoxia executions. They accordingly are indisputably relevant to Mr. Wilson's claims.

5. Defendant had until very recently maintained that ADOC did not possess any data from either the pulse oximeters or the EKG machines used in previous nitrogen hypoxia executions. On January 8, 2026, Defendant admitted, in response to Plaintiff's Requests for Admission Nos. 2 and 3, that no data were maintained on either the pulse oximeters or EKG machines.

6. Defendant also represented that he has no documents responsive to Plaintiff's Requests for Production Nos. 3 and 4 for printouts or data from the pulse oximeters and EKG machines used during past nitrogen hypoxia executions.

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7. Documents produced by Defendant in this litigation, however, indicate that [redacted]

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9. As soon as undersigned counsel discovered this in Defendant's productions, on February 10, 2026, undersigned counsel sent preservation letters to Defendant's counsel and ADOC's general counsel, requesting that ADOC refrain from using the pulse oximeters used in previous nitrogen hypoxia executions in any upcoming executions.

10. Such a precaution is necessary given that the data storage capacity on the devices is limited to [redacted], and thus continued use of these pulse oximeters therefore risks spoliation of existing data on the devices. Undersigned counsel also requested the opportunity to inspect the pulse oximeters and EKG machines with an expert and collect any stored data located on those devices.

11. Both Defendant and ADOC confirmed receipt of the preservation letters.

12. Defendant's counsel notified undersigned counsel on February 13, 2026, that ADOC is unable to comply with the requests in the preservation letter, claiming a limited number of medical devices at ADOC's disposal. On that same day, Defendant's counsel notified undersigned counsel that a member of ADOC's IT department would determine whether any data are stored on the pulse oximeters or EKG machines as soon as possible.

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13. Later on February 13, 2026, undersigned counsel requested an opportunity to independently inspect the two medical devices with an expert.

14. On February 18, 2026, Defendant's counsel notified undersigned counsel that she and a member of ADOC's IT team would inspect the devices at Holman Correctional Facility in the next few days, and following that inspection, undersigned counsel would be permitted to inspect the devices with an expert, an ADOC IT expert, and Defendant's counsel.

15. On February 19, 2026, undersigned counsel informed Defendant's counsel of several cables and pieces of software that may be needed to conduct the initial inspection, and undersigned counsel again reminded Defendant's counsel that the devices should not be used until any stored data are retrieved.

16. On February 25, 2026, Defendant's counsel and a member of ADOC's IT team conducted an inspection of the two pulse oximeters and EKG machines at Holman Correctional Facility. In Defendant's counsel's email report to undersigned counsel that same day, Defendant's counsel stated the following [redacted]

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[redacted]

17. The February 25, 2026, email reporting the findings from Defendant's counsel was the first instance in which Defendant acknowledged that data from past executions exists on the pulse oximeters, contrary to its prior representations.

18. The February 25, 2026, email was the first time that undersigned counsel was made aware that data from past executions exists on the pulse oximeters.

19. On February 27, 2026, the parties tentatively scheduled that undersigned counsel would inspect the medical devices with an expert on March 9, 2026, at 3:30 PM.

20. Undersigned counsel has conducted extensive research and consulted with several experts, and has learned that [redacted]

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[redacted]

21. According to experts consulted by undersigned counsel, [redacted]

22. It is Defendant's obligation to preserve and extract the data from these devices, but given the data's importance in this case, Plaintiff is prepared to offer assistance.

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23. It is Plaintiff's understanding that Defendant has not made additional efforts to extract the data from the pulse oximeters since the February 25, 2026 inspection.

24. Undersigned counsel is scheduled to inspect the pulse oximeters with Plaintiff's expert on Monday, March 9, 2026, but it is possible they will not have the proper equipment to extract the data by that time.

25. Plaintiff understands that the State of Alabama intends to execute an inmate pursuant to the state's nitrogen hypoxia protocol on March 12, 2026. Pursuant to that protocol, a pulse oximeter will be used. Plaintiff has no intention of impeding the execution scheduled for March 12, 2026, and indeed has asked Defendant to preserve the medical devices since February 10, 2026, the day he discovered the devices automatically retain data.

26. Defendant's claim that ADOC has limited access to suitable medical devices is difficult to square with the available facts. Earlobe pulse oximeters, like the ones at issue here, are ubiquitous and easily purchasable online. Many pulse oximeters are available for purchase in person at pharmacies like CVS or Walgreens, or through a medical device supplier. A quick Google search reveals many easily-purchased earlobe pulse oximeters. *See, e.g,* https://www.turnermedical.com/Creative_SP_20_Pulse_Oximeter_with_Ear_Sensor_p/creative_sp-

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20_ear.htm?srsltid=AfmBOoqVzlgoIxmFiMVZ1Xigt9O_9PJkwrXMlSj8C4qwpC9dUyHSZCtt1WU&com_cvv=8fb3d522dc163aeadb66e08cd7450cbbdddc64c6cf2e8891f6d48747c6d56d2c.

27. On March 4, 2026, the parties held a meet and confer to discuss the preservation of the pulse oximeter data. In response to Plaintiff's renewed request, counsel for Defendant represented that Defendant is not prepared to set the pulse oximeters aside and plans to use them in the March 12, 2026 execution. Counsel for Defendant asserts her belief [redacted]

28. Plaintiff contends that the continued use of the two pulse oximeters runs a material risk of loss of the data stored on them. [redacted]

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[redacted]

29. Defendant concedes that [redacted]

30. Plaintiff contends that *any* future usage of the devices risks the permanent loss of crucial existing data. Plaintiff believes that this risk justifies setting aside the devices until such time as the data are extracted.

31. Plaintiff is not presently moving for preservation of the EKG machines because Defendant reported that there is no data on those two devices.

32. The parties agreed to proceed with expedited briefing on this motion.

33. For these reasons, Plaintiff David Wilson seeks an order from the Court compelling Defendant to preserve the two pulse oximeters used in past nitrogen hypoxia executions until such time as the data on those devices are extracted.

Specifically, Mr. Wilson requests that Defendant and ADOC preserve the pulse oximeters by refraining from using the devices, ensuring that the batteries remain inside the devices, and properly marking and storing the devices to prevent accidental deletion, until the data stored on them are extracted.

ARGUMENT

Defendant has a duty to preserve the pulse oximeter data during this ongoing litigation, and this Court possesses the authority to compel Defendant's compliance with that obligation. District courts "have the discretion to order a party to preserve evidence, basing their authority in the inherent power to regulate litigation, preserve and protect the proceedings before [them], and sanction parties for abusive practices." *Scarbrough v. Virginia Coll., LLC*, 2019 WL 121277, at *1 (N.D. Ala. Jan. 7, 2019) (cleaned up); *see also In re Blue Cross Blue Shield Antitrust Litig.* (MDL No.: 2406), 2015 WL 10891632, at *5 (N.D. Ala. Nov. 4, 2015) ("Adversarial litigation cannot function if the parties carelessly or intentionally dispose of crucial evidence. Therefore, the duty to preserve evidence is something ancillary to, but also essential to, the resolution of the substantive issues in litigation. Because it is a duty inherent in litigation, it must always be subject to supervision and inquiry by the court."); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the

evidence may be relevant to anticipated litigation."); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

The data on the pulse oximeters are highly relevant to this litigation, and thus Plaintiff is entitled to its production. The relevancy of a discovery request is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any issue that is or may be in the case." *Coker v. Duke & Co., Inc.*, 177 F.R.D. 682, 685 (M.D. Ala. 1998) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also Abrams v. Ciba Specialty Chemicals Corp.*, 2009 WL 10692119, at *3 (S.D. Ala. May 22, 2009) ("[T]he Federal Rules of Civil Procedure allow discovery of any relevant, non-privileged material that is admissible or reasonably calculated to lead to admissible evidence. Fed. R. Civ. P. 26(b)(1). Moreover, the overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts and, therefore, embody a fair and just result"). In addition, "[r]elevant information is discoverable even if it is not admissible at trial, 'if the discovery appears reasonably calculated to lead to the discovery of admissible evidence'," as "[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible." *Abrams*, 2009 WL 10692119, at *3 (quoting Fed. R. Civ. P. 26(b)(1)). Finally, "discovery is not limited to issues

raised by the pleadings." *Id.* (quoting *Oppenheimer*, 437 U.S. at 351). Here, to Plaintiff's knowledge, the data stored on the pulse oximeters is the only extant medical data from past executions. As a result, it is the *only* quantitative data generated during executions that might help to resolve factual disputes concerning the length of consciousness during each execution.

Defendant has conceded that, contrary to his prior admissions, the pulse oximeters do contain data from past executions. Defendant thus has an obligation to preserve that data. The data from the pulse oximeters are indisputably material to this litigation, and will aid the Court and the parties in resolving factual disputes in the case. In addition, the pulse oximeter data were not available to any previous nitrogen hypoxia litigation plaintiff, as the Defendant claims to have been unaware of the pulse oximeter data until Plaintiff's counsel read the pulse oximeter manual produced in discovery by Defendant and informed Defendant's counsel that the devices store data. While media, lay, and expert witnesses can provide informative accounts of how long condemned persons have remained conscious and/or alive during each nitrogen hypoxia execution, empirical data from medical devices is of a fundamentally different nature from those observations.

Until Plaintiff's counsel alerted Defendant's counsel to the inaccuracy of its prior representations regarding data retention and Defendant's counsel's most recent inspection on February 25, 2026, Defendant inaccurately maintained that ADOC

possesses no pulse oximeter data. Extraction of all data from the pulse oximeters will permit undersigned counsel and his expert to assess the credibility of Defendant's previous and current representations concerning ADOC's conduct of executions.

Defendant's counsel has also failed to make any additional extraction efforts since discovering that the pulse oximeters retained data from prior executions, despite Plaintiff's previous requests for productions and admissions asking for data from medical devices used during past nitrogen hypoxia executions, and Plaintiff's preservation letters asking for the pulse oximeters to be preserved so that their data may be extracted.

Plaintiff has acted with maximum diligence. Plaintiff worked to discover relevant data that Defendant inaccurately represented did not exist. Plaintiff has been proceeding diligently despite the receipt of erroneous information from Defendant. This difficulty is compounded by the fact that the pulse oximeter model used by ADOC is approximately two decades old, and many of its accessories require additional time to obtain.

Moreover, ADOC would suffer no prejudice if it quarantined the pulse oximeters until data could be extracted from them. Pulse oximeters are widely available, and the ADOC could easily purchase replacement devices. The risk of prejudice to Plaintiff—and to the several other plaintiffs in currently pending

nitrogen hypoxia cases—is, on the other hand, significant. If the devices are used and data is lost, Plaintiff will be deprived of the only known data available from prior nitrogen hypoxia executions.

In sum, the devices should be preserved and not used until the data on them are extracted because any use may result in the loss of data. The data are the only data available from prior nitrogen hypoxia executions and are clearly relevant. The parties find themselves in this position only because of the repeated misstatements of fact on the part of Defendant. And there would be no prejudice to Defendant, who can easily purchase replacement devices.

Alternatively, if Defendant insists on using the devices in the next execution, the Court should make an inference that the data on the devices would prove that the oxygen levels and heart rates of those individuals who have previously been executed under the nitrogen hypoxia protocol declined at a rate that undermines the factual position asserted by Defendant.

WHEREFORE, Plaintiff David P. Wilson respectfully moves the Court to order Defendant to preserve the pulse oximeters until such time as the data on them can be transmitted onto an external hard drive or computer or printed. Plaintiff is doing everything possible to extract the data at the March 9, 2026, inspection, despite that obligation belonging to Defendant, but is not certain that he will have all the

necessary equipment in time. Plaintiff will submit a status report on the evening of March 9, 2026 informing the Court whether or not his expert was able to extract the data during the March 9, 2026 inspection. In the event that the data are not extracted by March 9, 2026, Plaintiff requests that the Court order the preservation of the two oximeters until such time as the data are extracted. Plaintiff is filing this motion now so as not to impede the State of Alabama's future executions and notes that replacement oximeters are readily available.

Done and signed this 4th day of March 2026.

Bernard E. Harcourt
Alabama Bar Number: ASB-4316-A31B

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Attorney for Plaintiff David Wilson

CERTIFICATE OF CONFERENCE

Pursuant to the Middle District of Alabama's Guidelines to Civil Discovery I(A), I hereby certify that on March 4, 2026, I, counsel for Plaintiff David Wilson, conferred with Lauren Simpson, counsel for Defendant John Hamm, in a good faith effort to resolve the issues raised by this motion. The parties were unable to resolve the issues raised in this motion because Defendant opposes the relief requested in this motion.

Bernard E. Harcourt

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2026, a paper copy of the foregoing motion has been conventionally filed with the Clerk of the Court and an electronic copy has been electronically mailed to counsel for Defendant:

Lauren Simpson, Esq.
Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130

I hereby certify that on March 4, 2026, a redacted copy of the foregoing motion has been electronically filed with the Clerk of the Court and a redacted copy has been electronically mailed to counsel for Defendant:

Lauren Simpson, Esq.
Office of the Attorney General
Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130

Bernard E. Harcourt